BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: NOW & ZEN, INC. 665 22nd Street San Francisco, CA 94107 Employer	Docket Nos. 00-R1D1-3492 through 3497 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration on its own motion of the decision of the Administrative Law Judge (ALJ) makes the following decision after reconsideration in the above-entitled proceeding.

JURISDICTION

On August 23, 2000, a representative of the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment maintained by Now & Zen, Inc. (Employer) at 665 22nd Street, San Francisco, California. On September 19, 2000, the Division issued six citations to Employer alleging serious, general, and regulatory violations of sections of the General Industry Safety Orders appearing in Title 8 of the California Code of Regulations, with proposed civil penalties totaling $21,335.

Employer filed a timely appeal from the citations contesting all proposed penalties, denying some of the violations, challenging the classification of one of the serious violations, and explaining its positions.

On August 16, 2001, a hearing was held before an ALJ of the Board in San Francisco, California. Miyoko Schinner (Schinner) President, represented Employer. Armstrong Lum (Lum), Associate Safety Engineer, represented the Division. At the beginning of the hearing the Division made motions to withdraw several citations and items, to reduce several items to Notices in Lieu of Citations with no penalties and to reduce some of the remaining penalties. Based upon those motions the total amount of the proposed penalties for the remaining violations was reduced to $3,185. Employer then moved to amend its appeal to limit the issue to the reasonableness of the penalties in light of the circumstances, including financial hardship. The parties stipulated that the

Division calculated the penalties, as amended, in accordance with its policies and procedures.

On August 30, 2001 the ALJ issued a decision assessing a total civil penalty of $10 based on the financial condition of Employer.

On September 25, 2001, the Board, on its own motion took the ALJ's decision under reconsideration. The Division filed an answer to the Board's order on November 29, 2001. Employer did not file an answer.

EVIDENCE

Schinner testified and presented documentary evidence for Employer's case. Employer is in the natural food industry. It specializes in making food products for people with severe dietary restrictions, such as food allergies, lactose intolerance, and diabetes. It makes vegetarian and "vegan" products, foods free of gluten,[1] and non-meat and non-dairy products for human consumption. Employer sells its products to distributors who, in turn, sell them to retailers. Employer began operating in 1998, about 2 years before the inspection, although its start-up was delayed many times by equipment down-time, which required frequent visits by the equipment manufacturer's technician.

The Division's inspection was instigated by a report of an accident that resulted in a serious injury. The parties stipulated that Employer had corrected all cited items before the hearing.

According to Employer's profit and loss statement for 2000 Employer had a total income of $932,306.73, a gross profit of $481,429.16 and a net loss of $374,463.45.

Employer brought to the hearing several binders with safety program materials and related programs it has implemented in the work place. Employer has spent additional funds to have them translated into Spanish. The materials are very voluminous, and the Division stipulated that it had reviewed them and found all the relevant programs to be in compliance.

Schinner explained that she was horrified by the accident that generated the inspection. However, the accident, and Lum's ensuing inspection, had beneficial consequences. Employer used both to focus on safety, maintain safety awareness, and keep it a high priority.

Schinner is a chef by profession, not a business executive, nor a safety professional. When she ran the operation, she did look for possible safety hazards, and could remember only one of major consequence. That situation

[1] People with celiac disease, said Schinner, can die from eating food containing gluten.

involved a mixer with what appeared to Schinner to be a hazardous zone. She took steps to correct the condition. Employer provided workers with long-sleeved shirts to wear around the steam kettles. It so happened that when Lum visited the plant, the worker assigned to that station unwisely and momentarily rolled up his sleeves. Lum testified that this was the reason he cited Item 6 of Citation 1, even though the kettle was on "low boil." With regard to several electrical violations Lum found, Schinner admitted that she had previously examined some of the same items without detecting a hazard. She realizes that her training and experience were insufficient in this area.

Employer now charges the plant manager with administering the safety program with the help of another worker with hands-on skills, and continuing to research for methods to maintain a safe work place. Schinner added, and the Division stipulated, that Employer is now "completely committed to making ongoing safety" improvements.

Schinner added that every dollar that Employer would be forced to pay in monetary penalties is one dollar it cannot use to stay afloat financially and maintain a safe work place. She believed it is in everyone's best interests to waive the penalties so Employer could use the money to maintain a safe work place. Assessing the proposed penalty would put it out of business. Even a $100 penalty would be an added incentive for its board to wait no longer and initiate bankruptcy proceedings.

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Board has viewed the entire record in this case and finds that the decision does not comport with the decision in *Dye & Wash Technology*, Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration, (July 11, 2001); and the more recent decisions in *The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466, Decision After Reconsideration, (Sept. 27, 2001); *Eagle Environmental, Inc.*, Cal/OSHA App. 98-1640, Decision After Reconsideration, (Oct. 19, 2001); and *DPS Plastering, Inc.*, Cal/OSHA App. 00-3865, Decision After Reconsideration, (Nov. 17, 2003) which establish guidelines for penalty relief based on financial hardship[2].

The examination and presentation of the evidence in this case for the relevant time period did not comport with the standards the Board finds necessary in order to grant extraordinary relief for financial hardship from the payment of properly assessed penalties.

[2] The ALJ's decision was issued subsequent to *Dye & Wash Technology*, but prior to the subsequent decisions which further refined the penalty relief doctrine based upon financial hardship. Although the later Board decisions setting forth considerations to be applied to financial hardship claims were not available to the ALJ, there is a sufficient record for the Board to reconsider Employer's financial hardship claim in this case in view of the Board's more recent precedent.

It appears from Employer's year 2000 profit and loss statement that an extraordinary amount of Employer's expenses were due to the cumulative effect of lax business practices that over-extended Employer's capital resources. For instance, a good deal of Employer's alleged expenses were stop payment fees, insufficient fund fees, bank and credit card fees, late charges and penalties. In addition, several of the expenses attributable to loss, such as depreciation and discounts off of invoice, do not appear to be actual money expenses used directly in the running of the business.

Employer's contention that it *might* at some future point have to declare bankruptcy was disallowed as a valid basis in and of itself for financial hardship relief in the recent Board decision of *SMA Office Furniture Laminated, Inc.*, Cal/OSHA App. 00-4113, Decision After Reconsideration (Nov. 7, 2003). In addition, in this case, the evidence did not persuade the Board that Employer would be unable to pay the proposed penalty in installments spread over a period of time reasonable to the circumstances. (See, *DPS Plastering, Inc., supra*)

Employer also failed to prove to the Board's satisfaction that it had a long history of providing safe employment and a dedicated commitment to employee safety and health. (See, *Dye & Wash Technology, supra*) While it is true that Employer abated the numerous violations after the citations were issued, the sheer volume and nature of the violations as well as Schinner's acknowledgement that there had been at least one other safety problem in the short time the company had been in the manufacturing business are indications that the citations were a wakeup call to get its house in order, not that Employer had the necessary long term commitment to safety required for extraordinary relief.

Finally, it does not appear that Employer's alleged financial hardship was related in any manner to correcting the violations. (See, *The Bumper Shop, supra)* Therefore, the Board finds that the record in the instant case amply supports a conclusion that Employer does not meet the requisite standards for penalty reduction relief. Accordingly, the decision of the ALJ is reversed on that issue.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ's decision as to the existence of the violations and reverses it as to the penalty relief. Civil penalties totaling $3,185 are assessed.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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